LIBRARY
SUPREME COURT, U. S.

FILED
AUG 1 1975
MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-179

NANCY A. BRAKE,
Petitioner,

vs.

MFA MUTUAL INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals
Saint Louis District

DALLAS W. COX, JR.
Suite 612—111 West Port Plaza
St. Louis, Missouri 63141
Counsel for Petitioner, Nancy A. Brake

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
Reasons for granting the Writ	6
A. Review by this Court is warranted to resolve a substantial conflict among the state court decisions interpreting the purpose of state uninsured motorist statutes where injured insureds do not have actually available to them the protection of financial responsibility laws because of a multiplicity of claims made against a policy complying with minimum financial responsibility law limits as such decisions are in conflict with applicable decisions of this court	6
B. Review by this court is warranted to resolve conflicts in decisions of the circuit courts of appeal on whether or not "other insurance clauses" are applicable to limit recovery to less than actual loss	8
C. Review by this court is warranted in view of the novelty and paramount public importance to call for an exercise of this court's power of supervision to right an injustice and to prevent continuous litigation in the circuit courts of appeal and the state courts	11
Conclusion	12

Appendix A

Opinion of trial court A-1

Appendix B

Opinion of Missouri Court of Appeals A-3

Appendix C

Motion for Rehearing and Motion for Transfer denied A-12

Appendix D

Application for Transfer to Supreme Court of Missouri denied A-13

Appendix E

Missouri Uninsured Motorist and pertinent provisions of Missouri Safety Responsibility Law, Sections 379.203, as amended 1972 and 303.020 (10), respectively A-14

Appendix F

Uniform Language of State Uninsured Motorist Statutes A-16

TABLE OF AUTHORITIES

Cases

Booth v. Seaboard Fire & Marine Insurance Company, 431 F2d 216, l.c. 216 (8th Circuit 1970) 9

Chandler v. Government Employees Insurance Company, 342 F2d 420 (5th Circuit 1965) 9

Cox v. Roth, 348 U.S. 207 (1955) 8

Haggar Company v. Helvering, 308 U.S. 389 (1940) ... 8

Insurance Company v. Stinson, 103 U.S. 25 (1880) 11

Kemp v. Fidelity & Casualty Company of New York, Tex. App., 504 SW2d 633 7

Kirkley v. State Farm Mutual Insurance Company, 17 Cal. App. 3d 1078, 95 Cal. Rptr. 427 (1971) 6, 7

Kokoszka v. Belford, 94 S.Ct. 2431 (1974) 8

Lund v. Mission Insurance Company, Oregon Sup., 528 P2d 78 (en banc 1972) 7

McCarthy v. Preferred Risk Mutual Insurance Company, 454 F2d 393 (9th Circuit 1972) 9

Martin v. State Farm Mutual Automobile Insurance Company, 375 F2d 720 (4th Circuit 1967) 9, 10

Porter v. Empire Fire & Marine Insurance Company, 106 Ariz. 274, 475 P2d 258 (banc 1970) 6, 7

Richards v. U. S., 369 U.S. 1 (1962) 8

Safeco Insurance Company of America v. Robey, 399 F2d 330 (8th Circuit 1968) 9

State Farm Mutual Automobile Insurance Co. v. McNutt, 494 F2d 1282 (6th Circuit 1974) 9

Teherepnin v. Knight, 389 U.S. 332 (1967) 8

White v. Nationwide Mutual Insurance Company, 361 F2d 785 (4th Circuit 1966) 10

Statutes

Section 303.020(10), RSMo. 1969 (Missouri Safety Responsibility Law) 3, A-14, A-15

Section 303.030, Chapter 303, RSMo. 1969, Motor Vehicle Safety Responsibility Law of Missouri A-4, A-5

Section 379.203, RSMo., as amended 1972 (Missouri Uninsured Motorist Statute) 3, A-4, A-6, A-7, A-9, A-14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. .....

NANCY A. BRAKE,
Petitioner,

vs.

MFA MUTUAL INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals
Saint Louis District

The Petitioner, Nancy A. Brake, respectfully prays that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Saint Louis District, entered in the above case on February 25, 1975.

OPINIONS BELOW

The opinion of the Circuit Court for the County of St. Louis, State of Missouri is not and will not be reported. It is attached as Appendix A hereto. The opinion of the Missouri Court of

Appeals, Saint Louis District, and that Court's Order denying Mrs. Brake's motion for rehearing, or, in the alternative, for Transfer to the Supreme Court of Missouri en banc, are not as yet reported. They are attached as Appendix B and C hereto. The Order of the Supreme Court of Missouri denying Mrs. Brake's Application for Transfer to the Missouri Supreme Court en banc, is not as yet reported. It is attached as Appendix D hereto.

JURISDICTION

The order of the Missouri Supreme Court denying Mrs. Brake's Application for Transfer was rendered on May 12, 1975 and became final for purposes of review on such date. This petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is envoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Is a cause of action barred under state uninsured motorist statutes solely because a state's minimum Financial Responsibility Law Limits are available on paper in a hypothetical or theoretical sense as distinguished from actually available to the insured?

2. If recovery is allowed under question 1 are minimum limits set by state financial responsibility laws equated with maximum recovery or may injured insureds "stack" uninsured motorist policies where such parties' actual loss is in excess of the minimum statutory limits? A corollary to question 2 is

Does the uninsured motorist carrier have a right of subrogation to the extent of the monies paid by the original tort-feasor's liability insurance policy when complete indemnification has not been made to the injured insured?

STATUTES INVOLVED

Sections 379.203, RSMo, as amended, 1972 (The Missouri Uninsured Motorist Statute) and 303.020 (10) of the Revised Statutes of Missouri (minimum limits of automobile liability insurance policies), are reproduced as Appendix E (App. pp. A-14-15). As approximately thirty five (35) states have adopted rather standard language for their respective uninsured motorist statutes, Widiss, A Guide to Uninsured Motorist Coverage, p. 129, such language is also set out hereafter in the Appendix as Appendix F (App. p. A-16).

STATEMENT OF THE CASE

Silas William Brake, husband of plaintiff Nancy A. Brake, was killed in a two-car automobile collision caused solely by the negligence of Donald W. Miller. Others killed in the collision between the Brake and Miller vehicles were Miller, Harold G. Brake and one Lorance. Silas William Brake, Harold G. Brake and Lorance left surviving dependent widows and 13 minor children. Four other persons received serious personal injuries in the collision. At time of collision Miller carried a policy of automobile liability insurance issued by Automobile Club Inter-Insurance Exchange which complied with the minimum requirements for exception from the suspension provisions of The Motor Vehicle Safety Responsibility Law of Missouri (§ 303.020 (10), RSMo 1969) subject to limits of required coverage of not less than $10,000 because of bodily injury to or death of one person in any one accident and $20,000 because of bodily injury to or death of two or more persons in any one accident. Miller's insurer filed an interpleader suit against twenty-one persons who had asserted claims of various kinds arising out of the negligence of Miller, and paid $20,000 (the maximum liability under the insurance policy) into the registry of the court.

The court ordered the $20,000 prorated among the claimants, awarding Nancy A. Brake $2,600 for her individual claim and $1,400 for the benefit of her five minor children, and awarding sums of from $1,000 to $4,000 to other claimants. Nancy A. Brake gave a receipt but not a release for the $4,000. Her cause of action for the wrongful death of her husband and on behalf of her five children had an agreed value of $50,000 (the wrongful death limit at such time in Missouri).

Silas William Brake, joint owner with his wife Nancy of the automobile in which he was riding as a passenger at time of collision, had purchased and paid premiums on two policies of automobile liability insurance issued by MFA Mutual Insurance Company on two different automobiles. Each policy provided uninsured motorist coverage for Mr. Brake and his spouse in the sum of $10,000 for each person and $20,000 for each accident.

The provisions of the two MFA policies extending uninsured motorist protection to Silas William Brake and his spouse obligated MFA to "pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; * * *." Paragraph 2 defined "uninsured highway vehicle" as "a highway vehicle with respect to the ownership, maintenance or use of which there is no bodily injury * * * **insurance policy applicable** at the time of the accident with respect to any person * * * legally responsible for the use of such highway vehicle * * *."

The case was decided upon stipulated facts between the parties and the Circuit Court and the Missouri Court of Appeals rendered their decisions, Appendix A and B hereto, in favor of MFA. The Missouri Supreme Court declined to accept transfer of the case, Appendix D.

The courts below based their decision denying recovery on the status of the motor vehicle being driven by the tort-feasor having complied with the minimum requirements of Missouri's Financial Responsibility Law and hence not being uninsured under the MFA policies or the uninsured motorist statute. The courts below employed a test of technical applicability, i.e. paper availability of the minimum limits of the Financial Responsibility Law rather than actual availability to the extent of said minimum limits to Mrs. Brake.

REASONS FOR GRANTING THE WRIT

A. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the State Court Decisions Interpreting the Purpose of State Uninsured Motorist Statutes Where Injured Insureds Do Not Have Actually Available to Them the Protection of Financial Responsibility Laws Because of a Multiplicity of Claims Made Against a Policy Complying With Minimum Financial Responsibility Law Limits as Such Decisions Denying Coverage Are in Conflict With Applicable Decisions of This Court.

The Courts of Arizona and California have recognized and given effect to Mrs. Brake's contention herein. *Porter v. Empire Fire & Marine Insurance Company*, 106 Ariz. 274, 475 P2d 258 (Ariz. Sup. 1970), and *Kirkley v. State Farm Mutual Insurance Company*, 17 Cal. App. 3d 1078, 95 Cal. Rptr. 427 (Cal. App. 1971).

The Courts of Texas, Oregon, and now Missouri ignore and disregard the reason behind uninsured motorist statutes and allow no recovery in this factual situation.

Porter and *Kirkley* allow recovery under uninsured motorist statutes and coverage where, although the tort-feasor has liability insurance complying with minimum limits of Financial Responsibility Law, claims for serious injury of more than one person are made and hence insurance of such person legally responsible is not sufficient to cover multiple claims and the injured party, because of the multiplicity of claimants, does not have available to him the entire per person minimum limits mandated by the state's Financial Responsibility Law to be applicable on such insurance policy. The basic rationale of such decisions is that uninsured motorist statutes and financial responsibility laws are for the protection of the public and to hold

otherwise and deny recovery is to thwart the protection expected by the injured party (in purchasing this type of first party coverage) and intended by the legislature for while the minimum limits of the tort-feasor's policy of insurance is said to be available it is paper coverage only theoretically or hypothetically available because actually it is subject to proration among multiple claimants. *Porter* and *Kirkley* emphasize that under a contrary holding the injured party faces the absurd anomaly that he would have been in a better position if the tort-feasor had been totally uninsured for as long as the injured party has the original policy theoretically available even though he recovers not $1.00 thereon, he has no right of action on his own uninsured motorist policies which he purchased.

On the other side of the fence on this precise issue where there are multiple claimants who have not had actually available to them at least the minimum limits of the state's financial responsibility law are Texas, Oregon and now Missouri. These states, it is respecfully submitted, ignore and disregard the reason behind uninsured motorist statutes to effectuate at least a minimum of protection and disallow any recovery[1] on the theory that proper inquiry forecloses relevancy of determination as to whether minimum limits were actually available to the injured party as long as such limits were on paper hypothetically or theoretically available at the time of the accident by the tort-feasor having a policy complying with the minimum statutory limits of that state. These courts denying recovery in these circumstances have departed from the accepted and usual canons of construction of statutes and such interpretations are in direct

---

[1] *Lund v. Mission Insurance Company*, Ore. Sup., 528 P2d 78 (en banc 1972) and the Missouri Court of Appeals decision herein, Appendix B hereto; *Kemp v. Fidelity & Casualty Company of New York*, Tex. App., 504 SW2d 633. In the Oregon case the injured party plaintiff actually recovered not one cent on the insurance policy of the person legally responsible to her in damages but the Court still disallowed her any recovery under the uninsured motorist policy or statute.

conflict with decisions of this court in which review was warranted by certiorari to avoid a literal reading of a statute which would otherwise lead to an absurd result *Haggar Company v. Helvering*, 308 US 389 (1940); *Cox v. Roth*, 348 US 207 (1955). This court should also grant certiorari as it has so done to construe remedial legislation (which uninsured motorist legislation obviously is) broadly to effectuate its purposes *Teherepnin v. Knight*, 389 US 332 (1967), and in order to adopt a construction as will carry into execution the will of the legislature *Kokoszka v. Belford*, — US —, 94 S Ct 2431 (1974) by looking to the provisions of the entire law and to its object and policy. *Richards v. U.S.*, 369 US 1 (1962).

B. Review by This Court Is Warranted to Resolve Conflicts in Decisions of the Circuit Courts of Appeal on Whether or Not "Other Insurance Clauses" Are Applicable to Limit Recovery to Less Than Actual Loss.

The Uninsured Motorist coverage of the two (2) policies issued by MFA contain the standard clause limiting coverage.[2] Since the parties stipulated the death claim of Mrs. Brake has a legal value of $50,000 this case poses the additional question of whether MFA's liability can be so limited to the $10,000 in one of its two (2) $10,000 uninsured motorist policies.

The Circuit Courts of Appeal are in conflict on this issue. One line of cases holds that Mrs. Brake should recover the entire $20,000 (the sum total of the two (2) policies) as there is no double recovery where her damages, i.e., $50,000 are still

---

[2] Other Automobile Insurance in the Company—With respect to any occurrence, accident, death, or loss to which this and any other automobile insurance policy issued to the named insured or spouse by the Company also applies, the total limit of the Company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy.

not fully indemnified[3] reasoning that such a limitation runs contradictory to the standard insuring agreement of each policy that the company shall pay *all sums* which the insured could recover from the legally responsible uninsured motorist. Furthermore, those courts which have struck down such a limitation emphasize that such view follows from a proper construction of uninsured motorist statutes as the legislative mandate does not permit "other insurance" clauses in the policy for such are contrary to the statutorily mandated minimum amounts of coverage for the statute should not limit an insured loss only to one $10,000 recovery under said coverage where loss for bodily injury is greater than $10,000 and the injured party is the beneficiary of more than one policy as *every* policy must be issued in compliance with the Financial Responsibility Law and the uninsured motorist statute. Moreover, this view holds that minimum statutory coverage should not be equated with maximum recovery where indemnification is not complete and the insured has paid two (2) separate premiums.

The contrary view[4] holds that such limiting language of uninsured motorist policies do not offend legislatively mandated minimum statutory sum for the insured has access to at least the statutory minimum and public policy is to afford the same protection to the injured party that he would have had had the uninsured motorist carried the minimum limits of liability coverage.

A corollary problem is the right of subrogation given by most state uninsured motorist statutes. Such language normally fol-

---

[3] *Booth v. Seaboard Fire & Marine Insurance Company*, 431 F2d 216, l.c. 216 (8th Circuit 1970); *Martin v. State Farm Mutual Automobile Insurance Company*, 375 F2d 720 (4th Circuit 1967); *Safeco Insurance Company of America v. Robey*, 399 F2d 330 (8th Circuit 1968); *State Farm Mutual Automobile Insurance Co. v. McNutt*, 494 F2d 1282 (6th Circuit 1974).

[4] *McCarthy v. Preferred Risk Mutual Insurance Company*, 454 F2d 393 (9th Circuit 1972); *Chandler v. Government Employees Insurance Company*, 342 F2d 420 (5th Circuit 1965).

lows the standard language of Uniform Statutory Provisions[5] Widiss, A Guide to Uninsured Motorist Coverage, p. 313 and the standard subrogation clause contained in the MFA policies.[6]

The right of subrogation given, literally interpreted, would subrogate MFA to Mrs. Brake's rights against the original tort-feasor and hence, ultimately his insurance coverage to the extent of Mrs. Brake's receipt of $4,000 therefrom.

The Fourth Circuit Court of Appeals has dealt squarely with the problem of such subrogation statutes and policy language in holding that no right of subrogation exists. *White v. Nationwide Mutual Insurance Company*, 361 F2d 785 (4th Circuit 1966); *Martin v. State Farm Mutual Automobile Insurance Company*, 375 F2d 720 (4th Circuit 1967). The rationale of the holdings of *White* and its progeny is that the uninsured motorist carrier misconstrues its subrogation rights when it contends the policy and the statute gives it first rights ahead of the injured insured to the monies paid by or on behalf of the orig-

---

[5] In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such prson against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer; provided, however, with respect to payments made by reason of the coverage described in subsection . . . above, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor.

[6] *Subrogation*—In the event of any payment under uninsured motorist coverage of this policy, the Company shall be subrogated to all rights of recovery therefor which the insured or any person receiving such payment may have against any person or organization, and the insured, or such person, shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured, or such person, shall do nothing after loss to prejudice such rights.

inal tort-feasor as no paramount right of subrogation arises until the insured has received full indemnity. To the same effect is this court's view on the theory of subrogation dating back to at least 1880. *Insurance Company v. Stinson*, 103 US 25 (1880). As this problem of subrogation is corollary to the question of indemnity posed by the "other insurance clause" cases in which the decisions of the Courts of Appeal are in conflict this Court should grant the writ.

C. Review by This Court Is Warranted in View of Paramount Public Importance to Call for an Exercise of This Court's Power of Supervision to Right an Injustice Herein and to Prevent Continuous Litigation in the Circuit Courts of Appeal and the State Courts.

Uninsured motorist coverage ranges from 5/10 20/40, depending upon the state. Widiss, A Guide to Uninsured Motorist Coverage, p. 284. It takes little imagination to recognize that expenses alone resulting from injuries sustained by four or five persons riding in a car struck by an uninsured motorist may each exceed such coverage.

Moreover, most frequently found coverage limit for automobile bodily injury liability insurance is $10,000 per person although fatality cases suffer average actual losses of $89,000 per fatality; $10,000 per person coverage is held by about 30% of all policy holders in the United States. Schwartz, "The Fair Pay Plan—Fair Play for Consumers," Trial (Nov/Dec 1971). Insurance companies have for the most part made uninsured motorist coverage available only in the minimum amounts required by state financial responsibility laws. Widiss, A Guide to Uninsured Motorist Coverage, p. 137. Hence, the injustice befalling petitioner is most assuredly not an isolated problem but has potentially enormous impact and wide application to the entire public. Unless this Court grants certiorari and closely

examines the questions posed therein petitioner and all other citizens similarly situated stand to be left grossly uninsured against irresponsible motorists despite these citizens' attempts to insure themselves against such a contingency and contrary to the purpose of uninsured motorist legislation. Furthermore, of all federal and state decisions on any of the three questions posed herein by petitioner, only petitioner's cause poses all three (3) issues in one case which, if certiorari be granted, could be resolved with finality.

CONCLUSION

For the foregoing reasons, Mrs. Brake respectfully prays that her Petition for a Writ of Certiorari be granted.

Respectfully submitted

DALLAS W. COX, JR.
COX, MOFFITT & COX
612 The Plaza Tower
111 West Port Plaza
St. Louis, Missouri 63141
Attorneys for Petitioner

APPENDIX A

Opinion of the St. Louis County Circuit Court, in This Case Dated December 10, 1973

In the Circuit Court, County of St. Louis, Missouri

December 10, 1973

Nancy A. Brake,
Plaintiff,
vs.
MFA Mutual Insurance Company,
Defendant.
No. 345492

Plaintiff's Motion for Summary Judgment, heretofore submitted, denied. Defendant's Motion for Summary Judgment, heretofore submitted, sustained. Plaintiff seeks to recover on two insurance policies which provide for payment if plaintiff sustains damages as a result of negligent operation of an "uninsured highway vehicle." At the time of the collision causing plaintiff's husband's death and plaintiff's damages by reason thereof, the driver of the automobile involved was an insured motorist. The fact that the full limits of his policy were exhausted without fully compensating plaintiff for her damages does not entitle plaintiff to recover. This Court cannot rewrite the policies of insurance between plaintiff and her own insurance company and change the definition of uninsured highway vehicle to a highway vehicle which does not carry sufficient coverage to compensate plaintiff for her damages. Accordingly,

judgment is rendered in favor of defendant and against plaintiff. Costs against plaintiff.

cc: Mr. Dallas W. Cox, Jr.
Attorney for Plaintiff

Mr. William B. England
Attorney for Defendant

so ordered

.....
Attorney

.....
Attorney

/s/ RLC—15

.....
Judge

APPENDIX B

Opinion of the Missouri Court of Appeals in This Case, Dated February 25, 1975

In the Missouri Court of Appeals, St. Louis District
Division Four

January Session 1975

Nancy A. Brake, Plaintiff-Appellant, vs. MFA Mutual Insurance Company, a Corporation, Defendant-Respondent.	No. 35893 Appeal from the Circuit Court of St. Louis County Hon. Robert Campbell, Judge

(Opinion Filed: February 25, 1975)

Silas William Brake, husband of plaintiff Nancy A. Brake, was killed in a two-car automobile collision caused solely by the negligence of Donald W. Miller. Others killed in the collision between the Brake and Miller vehicles were Miller, Harold G. Brake and one Lorance. Silas William Brake, Harold G. Brake and Lorance each left surviving a widow and several minor children. Four other persons received serious personal injuries in the collision. At time of collision Miller carried a policy of automobile liability insurance issued by Automobile Club Inter-Insurance Exchange which complied with the minimum requirements for exception from the suspension provisions of The Motor Vehicle Safety Responsibility Law, Chapter 303,

§ 303.030, RSMo 1969, i.e., subject to limits of $10,000 because of bodily injury to or death of one person in any one accident and $20,000 because of bodily injury to or death of two or more persons in any one accident. Miller's insurer filed an interpleader suit against twenty-one persons who had asserted claims of various kinds arising out of the negligence of Miller, and paid $20,000 (the maximum liability under the insurance policy) into the registry of the court. The court ordered the $20,000 prorated among the claimants, awarding Nancy A. Brake $2,600 for her individual claim and $1,400 for the benefit of her five minor children, and awarding sums of from $1,000 to $4,000 to other claimants. Nancy A. Brake gave a receipt but not a release for the $4,000. Her cause of action for the wrongful death of her husband and on behalf of her five children had an agreed value of $50,000.

Silas William Brake, joint owner with his wife Nancy of the automobile in which he was riding as a passenger at time of collision, had purchased and paid premiums on two policies of automobile liability insurance issued by MFA Mutual Insurance Company on two different automobiles. Each policy provided uninsured motorist coverage for Mr. Brake and his spouse in the sum of $10,000 for each person and $20,000 for each accident. Following receipt of the $4,000 Nancy A. Brake filed this suit against MFA, praying for $40,000 damages under the two insurance policies. MFA moved to dismiss the petition and for summary judgment. Plaintiff filed a countermotion for summary judgment. The parties stipulated as to the facts. Upon submission the circuit court denied plaintiff's motion for summary judgment; sustained defendant's motion for summary judgment, and rendered judgment in favor of MFA and against plaintiff. Plaintiff appealed.

The Uninsured Motorist Law, § 379.203, RSMo 1969, par. 1, requires that automobile liability insurance provide coverage "in not less than the limits for bodily injury or death set forth

in section 303.030, RSMo [the Safety Responsibility Law], for the protection of persons injured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom." Paragraph 2 provides: "For the purpose of this coverage, the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified herein because of insolvency." Paragraph 4 gives rights of subrogation to the insurer making payment under this coverage.

The Motor Vehicle Safety Responsibility Law, Chapter 303, § 303.030, 5., sets the limits of the required coverage at not less than $10,000 because of bodily injury to or death of one person in any one accident, and not less than $20,000 because of bodily injury to or death of two or more persons in any one accident.

The provisions of the two MFA policies extending uninsured motorist protection to Silas William Brake and his spouse are contained in Coverage E, Part V of the identical policy forms. Paragraph I obligated MFA to "pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; * * *." Paragraph 2 defined "uninsured highway vehicle" as "a highway vehicle with respect to the ownership, maintenance or use of which there is no bodily injury * * * insurance policy applicable at the time of the accident with respect to any person * * * legally responsible for the use of such highway vehicle * * *."

The first question is whether Miller's automobile was an uninsured highway vehicle within the meaning of that term as used in Part V, Coverage E, par. I of the MFA policy.

Plaintiff contends that, as evidenced by the Uninsured Motorist Law, § 379.203, supra, there is a statutory mandate on MFA under an established public policy to pay *all sums* referred to in par. I; that every insured such as Mrs. Brake is entitled under the uninsured motorist coverage to payment of the damages which she could have recovered had the tort-feasor maintained a policy of liability insurance in a sum sufficient to respond in damages to the extent of the $10,000 statutory minimum; that the term "uninsured motor vehicle" as used in § 379.203 is ambiguous; that it was drafted to comply with and was designed to satisfy the Safety Responsibility Law; that when considered in that frame of reference it makes no sense to extend coverage under which the insured is better off if the tort-feasor has no insurance than if he has some but not enough insurance to pay for the damages inflicted; that the courts ought to allow additional recovery under the uninsured motorist endorsement "whenever the uninsured motorist coverage exceeds the tort feasor's liability insurance and the tort feasor's insurance is insufficient to fully indemnify the claimant"; that the policy reference to uninsured motor vehicles conflicts with The Motor Vehicle Safety Responsibility Law, Chapter 303, and is void because in this case it effectively reduces the statutory minimum of $10,000 to $4,000. Plaintiff asks for a liberal construction of the language of the policy to effectuate the legislative intention that indemnity in the minimum sum of $10,000 be afforded against loss inflicted by a financially irresponsible person; contends that the coverage afforded by the Miller policy of insurance was only hypothetically or partially available to her, i.e., to the extent of $4,000 only instead of the $10,000 to which she had a legal right under the Uninsured Motorist Law; that because of the multiple claims made against Miller's $20,000 coverage the basic policy of the Uninsured Motorist Law has been frustrated; that the words "uninsured highway vehicle" should be construed to include every situation in which the tort-feasor actually has insufficient insurance "for whatever reason" to cover

and pay in full all claims against him, up to the limits of the uninsured motorist protection he has purchased.

Uninsured motorist statutes are to be liberally construed to accomplish their highly remedial purpose, which is "'"to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy."'" Webb v. State Farm Mutual Automobile Ins. Co., 479 S.W. 2d 148, 151 [3] (Mo. App. 1972). Under the guise of construction, however, the courts are not at liberty to extend and enlarge the scope of the Uninsured Motorist Law by declaring an insured motorist to be an uninsured motorist, unless the statute itself clearly provides an exception to cover the case. MFA's policies afford protection against injuries, etc. inflicted by an *uninsured* highway vehicle. The policies define such a vehicle as one with respect to the use of which there is *no bodily injury insurance applicable* at the time of the accident with respect to the person legally responsible for its use. The statute relates to *uninsured* motor vehicles and provides no exception which would cover the case before us. Here the tort-feasor's motor vehicle was covered by a liability insurance policy which complied with the minimum requirements of the Safety Responsibility Law.

The term "uninsured motor vehicle" as used in § 379.203, 1. and the term "uninsured highway vehicle" as used in the MFA policies, are not ambiguous, as claimed, but are terms of common meaning and understanding. "Un" means not. An uninsured vehicle is one which is not insured. When language is plain, straightforward and suspectible of only one meaning there is no room for judicial construction because there is nothing to construe. Swaringin v. Allstate Insurance Co., 399 S.W. 2d 131, 133 (Mo. App. 1966); Legett v. Missouri State Life Ins. Co., 342 S.W. 2d 833, 851 (Mo. banc 1960). Where language in an insurance policy is unambiguous and does not offend against public policy it must be accorded its plain meaning and it must

be enforced as written. "For, to do otherwise would be to make a new contract for the parties * * * in contravention of the long-recognized and oft-invoked rule that '[c]ourts are without authority to rewrite contracts, even insurance contracts, although it may appear that in some respects they operate harshly or inequitably as to one of the parties. * * *' " Kisling v. MFA Mutual Ins. Co., 399 S.W. 2d 245, 253, and authorities cited.

Clearly Miller's automobile does not come within either the language of the statute ("uninsured motor vehicle") or that of the MFA policies ("uninsured highway vehicle"). Miller's vehicle was not uninsured. On the contrary, Miller owned a policy of liability insurance on his vehicle in amounts prescribed by and in full compliance with the minimum requirements of the law. Miller's automobile was insured and the insurance was applicable at the time of the accident. Plaintiff failed to sustain her burden of showing that the uninsured motorist provisions of the MFA policies afford coverage to her as a result of this accident. MFA is liable under its policies "only in those instances where the guilty tortfeasor is either uninsured or [his] insurance carrier becomes insolvent within a period of [two years after the accident] and is unable to respond to damages under its insurance policy. Such limited coverage may not be extended except by clear and unambiguous provisions of a duly enacted statute or the insurance policy sued upon. The insurance polic[ies] in the case sub judice contain no provision purporting to extend or expand the coverage beyond that required by the statute." Golphin v. Home Indemnity Co., 284 So. 2d 442, 444 (Fla. App. 1973).

To hold in favor of plaintiff would require the exercise by this Court of powers it does not possess, namely, to revise the statute and reconstruct the contract entered into between the parties by ruling that an "uninsured" vehicle includes an insured vehicle, in a situation not covered by the Uninsured Motorist Law, viz., where the liability insurer is unable to make full pay-

ment with respect to the legal liability of its insured within the specified limits because due to a multiplicity of claims arising out of a single accident the limited proceeds of the policy must be divided among and distributed to several claimants on a pro rata basis. This we decline to do.

If the General Assembly had intended that the term "uninsured motor vehicle" cover this situation it would have so provided in § 379.203. The lawmakers made one exception, by providing in par. 2 that the term "uninsured motor vehicle" includes an insured motor vehicle where the liability insurer becomes insolvent. That exception, however, does not cover this case. No exception was made by the General Assembly for the protection of an injured party where multiple claims reduce his participation in the proceeds of the tort-feasor's policy. There are several other conceivable fact situations in which the general public policy of the Uninsured Motorist Law may be frustrated but for which the General Assembly has made no provision. For instance, where the tort-feasor's insurer denies liability; where the tort-feasor's policy is issued in an amount less than the limits prescribed by the Safety Responsibility Law, or where although the tort-feasor is insured in compliance with the law and there is only one person injured the damages for which the tort-feasor is legally liable far exceed $10,000. Perhaps the General Assembly will review the advisability of further amendment of § 379.203, in the light of this case and other conceivable hardship cases, to provide broader protection under uninsured motorist coverage in specified cases. In the meantime the courts must enforce § 379.203 as it is written.

The majority of other jurisdictions which have passed upon this and closely related situations involving uninsured motorist statutes and comparable policy provisions have come to the same conclusion we have reached. We align ourselves with the majority as exemplified by the following authorities: Travelers Ins. Co. v. Bouzer, 39 Cal. App. 3d 992, 114 Cal. Rptr. 651

(1974); Villarreal v. Texas Farmers Insurance Co., 510 S.W. 2d 633 (Tex. Civ. App. 1974); Kemp v. Fidelity & Casualty Co. of N.Y., 504 S.W. 2d 633 (Tex. Civ. App. 1973); Golphin v. Home Indemnity Co., supra; Lund v. State Farm Mutual Automobile Ins. Co., 342 F. Supp. 917 (W.D. Okla. 1972); Gordon v. Phoenix Ins. Co., 242 So. 2d 485 (Fla. App. 1970); Continental Ins. Co. v. Wallace, 233 So. 2d 195 (Fla. App. 1970); Smiley v. Estate of Toney, 44 Ill. 2d 127, 254 N.E. 2d 440 (1969); Detrick v. Aetna Casualty and Surety Co., 261 Ia. 1246, 158 N.W. 2d 99 (1968).

Plaintiff relies upon Porter v. Empire Fire and Marine Ins. Co., 106 Ariz. 274, 475 P. 2d 258 (banc 1970), and Kirkley v. State Farm Mutual Ins. Co., 17 Cal. App. 3d 1078, 95 Cal. Rptr. 427 (1971). Porter allows recovery under uninsured motorist coverage where, although the tort-feasor is not uninsured, his insurance is not sufficient to cover multiple claims arising out of the occurrence, on the theory that otherwise the protection expected by the injured party and intended by the legislature in passing the financial responsibility laws would not be afforded; that while $10,000 is said to be available under the tort-feasor's policy of insurance it is only theoretically available to the injured party (is only "paper coverage") because actually it is subject to proration among multiple claimants. The court emphasizes that under defendant's theory the injured party would be in a better position if the tort-feasor had been totally uninsured. Although that is the anomalous result, this does not authorize a court to enlarge the meaning of words which are clear and unambiguous or write into the statute something not there. We cannot accept the reasoning of the Porter case. Nor are we persuaded by Kirkley, in which the uninsured motorist coverage was brought into play on the basis of prior California decisions holding that uninsured motorist coverage is applicable where the offending vehicle is *under*insured, that is, covered by liability insurance in an amount less than the minimum prescribed by the financial responsibility law. We cannot in good

conscience hold that "uninsured" includes "underinsured." Furthermore, the policy definition of "uninsured automobile" in Kirkley is distinguishable from the language in the MFA policies before us.

In view of our holding we need not consider other points raised by appellant, namely, the question of "stacking", and whether interest runs from date of accident or date of judgment.

Judgment affirmed.

/s/ Norwin D. Houser, Special Judge

Gerald M. Smith, Chief Judge, Concurs

Alden A. Stockard, Special Judge, Concurs

APPENDIX C

St. Louis, Missouri

April 14, 1975

Missouri Court of Appeals
St. Louis District

No. 35,893

Nancy A. Brake,
Appellant,

vs.

M.F.A. Mutual Insurance Company,
Respondent.

Appellant's motion for rehearing or transfer denied.

APPENDIX D

Supreme Court No. 59,054

Court of Appeals No. 35,893

In the Supreme Court of Missouri

May Session, 1975

Nancy A. Brake,

Appellant,

vs. Transfer

MFA Mutual Insurance Company, a Corporation,

Respondent.

Now at this day, on consideration of appellant's application to transfer the above entitled cause from the St. Louis District of the Missouri Court of Appeals, it is ordered that said application be, and the same is hereby denied.

State of Missouri—Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1975, and the 12th day of May, 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 12th day of May, 1975.

.....

Clerk

.....

D. C.

APPENDIX E

Section 379.203. RSMo. as Amended 1972

1. No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.020, RSMo, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed, subject to the limits prescribed in this section, to satisfy the requirements of this section.

2. For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified herein because of insolvency.

3. An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tortfeasor becomes insolvent within two years after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

4. In the event of payment to any person under the coverage required by this section, and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer; provided, however, with respect to payments made by reason of the coverage described in subsections 2 and 3 above, the insurer making such payment shall not be entitled to any right of recovery against such tortfeasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tortfeasor, as amended 1972.

Section 303.020 (10) RSMo. 1969

Proof of financial responsibility, proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of ten thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of two thousand dollars because of injury to or destruction of property of others in any one accident.

APPENDIX F

Uniform Statutory Provision

No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemented thereto, in limits for bodily injury or death set forth in * * * statutes, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.